SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JERRY KRONENBERG
Borovsky, Ehrlich & Kronenberg
120 South LaSalle Street
Chicago, Illinois 60603

GERALD TOCKMAN
McMahon & Berger
7701 Forsyth Boulevard
St. Louis, Missouri 63105

Attorneys for Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

D. J. SULLIVAN
Lewis, Rice, Tucker, Allen & Chubb
611 Olive Street
St. Louis, Missouri 63101

Attorneys for Petitioner Sears, Roebuck and Co.

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
1. The Decision Below Disregards the Separation of Powers Effected by Section 3(d) of the Act	6
2. The Instant Case Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	9
3. The Participatory Rights of Charging Parties Here Involved Should Be Recognized by This Court	12
Conclusion	16
Appendix	1a
Opinion of the United States Court of Appeals for the Eighth Circuit, Dated November 3, 1971	1a
Judgment of the United States Court of Appeals for the Eighth Circuit, Dated December 3, 1971	6a
Order of the United States District Court for the Eastern District of Missouri, Eastern Division, Dated July 30, 1970	7a
Appeal from Regional Director's Denial of Charging Parties' Rights to Fully Participate in Proceeding and Demand for Information, Dated July 17, 1970	8a
Decision of the General Counsel of the National Labor Relations Board on Appeal from Regional Director's Denial of Charging Parties' Rights, Dated July 22, 1970	13a
Statutes Involved	15a

CITATIONS

Page

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) .. 10
Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971) 9
American Mail Lines v. Gulick, 411 F.2d 696 (D.C. Cir. 1966) 15
Automobile Workers v. N.L.R.B., 231 F.2d (7th Cir. 1956) 12
Bandlow v. Rothman, 278 F.2d 866 (D.C. 1960), *cert. den.*, 364 U.S. 909 (1960) 10
Barlow v. Collins, 397 U.S. 159 (1970) 10
Frito Company v. N.L.R.B., 330 F.2d 458 (9th Cir. 1964) 7
Fusco v. Richard W. Kaase Baking Co., 205 F.Supp. 459 (N.D. Ohio 1962) 15
Getman v. N.L.R.B., — F.2d —, 78 LRRM 2101 (D.C. Cir. Aug. 31, 1971) 15
Hourihan v. N.L.R.B., 201 F.2d 187 (D.C. Cir. 1952) .. 10
International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 289 F.2d 757 (D.C. Cir. 1960) 8
Jewel Companies, Inc. v. F.T.C., 432 F.2d 1155 (7th Cir. 1970) 11
Leedom v. Kyne, 358 U.S. 184 (1958) 10
Leeds & Northrup v. N.L.R.B., 357 F.2d 527 (3rd Cir. 1966) 12
Lincourt v. N.L.R.B., 170 F.2d 306 (1st Cir. 1948) 8
Local 112, International Union Allied Industrial Workers of America v. Rothman, 209 F.Supp. 295 (D.D.C. 1962) 9
Local 282, International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America v. N.L.R.B., 338 F.2d 795 (2nd Cir. 1964) 7
Madden v. Milk Wagon Drivers Union, 229 F.Supp. 490 (N.D. Ill. 1964) 15
Marine Engineers Beneficial Association v. N.L.R.B., 202 F.2d 546 (3rd Cir. 1953) 12
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 11
Moss v. C.A.B., 430 F.2d 891 (C.A. D.C. 1970) 15

Page

Myers v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938) 10, 11
N.L.R.B. v. Ampex Corporation, 442 F.2d 82 (7th Cir. 1971) 8
Piasecki Aircraft Corp. v. N.L.R.B., 280 F.2d 575 (3rd Cir. 1960), *cert. den.*, 364 U.S. 933 (1961) 8
Saez v. Goslee, — F.Supp. —, 79 LRRM 2001 (D.P.R., Dec. 3, 1971) 10
Skinner & Eddy v. United States, 249 U.S. 557 (1919) .. 11
Solien v. Miscellaneous Drivers and Helpers Union, Local No. 610, — F.2d — (8th Cir. Dec. 17, 1971) .. 4
Southern California District Council of Laborers v. Ordman, Civil No. 70-603-HP (C.D. Cal. Sept. 18, 1970) 10
Terminal Freight Handling Co. v. Solien, — F.2d —, 77 LRRM 2625 (8th Cir., June 18, 1971), *pet. cert. pend.*, No. 71-609 4
United Automobile Workers v. Scofield, 382 U.S. 205 (1965) 12, 13, 14

MISCELLANEOUS:

34th Annual Report of NLRB:
Fiscal Year 1969, 1970
BNA Labor Relations Yearbook 6

Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U.Chi.L. Rev. 786 (1965) 14

Davis, 3 Administrative Law Treatise, § 20.02 (1965 Supp.) 11

Jaffe, Judicial Control of Administrative Action, 435 (1965) 11

II Legislative History of the Labor-Management Reporting Act of 1959 15

Role of Examiner in Settling NLRB Complaints, 1966 BNA Labor Relations Yearbook 363 (The Bureau of National Affairs, Inc. 1967) 14

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 10

Senate Report No. 105, 80th Cong., 1st Sess. (1947) .. 15

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v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Sears, Roebuck and Co. ("Sears") and Terminal Freight Handling Cooperative Association and Terminal Freight Handling Company ("Terminal"), charging parties before the National Labor Relations Board, seek a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit. The court below affirmed the decision of the District Court that it lacked subject matter jurisdiction to enjoin a Board regional director, as agent for the General Counsel of the Board, from negotiating a settlement agreement of Petitioners'

unfair labor practice charges while, at the same time, refusing to allow Petitioners to meaningfully participate in such negotiations.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at — F.2d —, 79 LRRM 2710 and is printed at App. 1a. The judgment of that Court is printed at App. 9a. The oral opinion of the District Court is unreported; that Court's order of dismissal is printed at App. 7a. Petitioners' appeal to the General Counsel from the Respondent Regional Director's denial of their request to participate in the settlement negotiations of their charges, and the General Counsel's final administrative affirmance of that denial are printed at App. 9a and App. 10a, respectively.

JURISDICTION

The opinion and judgment of the court below from which Petitioners seek review were entered on November 3, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, notwithstanding the final authority in respect to the issuance and prosecution of unfair labor practice cases granted the General Counsel of the National Labor Relations Board by Section 3(d) of the National Labor Relations Act, the decisions of the General Counsel as to the procedures to be followed in the settlement of cases may nevertheless be reviewed by the Board itself.

2. Whether the final administrative decision of the General Counsel of the National Labor Relations Board as to the procedures to be followed in the settlement of cases may be reviewed in an equity suit in a federal district court.

3. Whether the General Counsel of the National Labor Relations Board may exclude charging parties before the Board from meaningful participation in the settlement of their cases.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*), the Administrative Procedure Act (80 Stat. 381, 5 U.S.C. § 551, *et seq.*) and 28 U.S.C. §§ 1337 and 1361 are set forth in App. 15a-21a.

STATEMENT OF THE CASE

On June 9 and 10, 1970, Miscellaneous Drivers and Helpers Union, Local No. 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") commenced picketing various retail stores and warehouses of Sears and Terminal,[1] as part of a dispute with another employer. Petitioners thereupon filed charges with Respondent Regional Director Solien ("Solien") accusing the

[1] Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of about forty independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States.

Union of engaging in a secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act (the "Act").

Although it was asserted that the Union's picketing at all the Sears and Terminal sites was unlawful, Solien initially found improper conduct at only the retail stores. A proposed informal settlement, covering merely these locations, was then tendered by Solien to Petitioners. Petitioners were provided with neither advance notification that Solien was attempting to negotiate a settlement of their charges nor an opportunity to participate in framing the terms of the settlement agreement.

Petitioners proceeded to file written objections to the proposed limited, informal settlement. They also filed a complaint in District Court to compel Solien to seek temporary injunctive relief, as required by Section 10(l) of the Act, to terminate the secondary boycott.[2] At this point, again without notice or explanation to Petitioners, Solien abruptly changed his position and declined to process further the proposed informal settlement. Instead, he issued a complaint, and filed a petition for a Section 10(l) injunction,[3] alleging the Union had engaged in a secondary boycott at not only the retail stores but *all* of the locations involved.

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[2] This action, modified after 10(l) complaint was eventually filed so as to seek a declaratory judgment as to the propriety both of Solien's initial refusal to proceed and the still-existing internal agency rule which dictated or permitted that refusal, is now pending before this Court in a closely related petition for certiorari. *Terminal Freight Handling Co., et al.* v. *Solien*, No. 71-609.

[3] The Petitioners have also recently been denied the right to independently oppose a settlement stipulation negotiated in lieu of injunctive relief. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, — F.2d — (8th Cir. Dec. 17, 1971). A petition for certiorari from this decision is being filed concurrently herewith.

Subsequently, Petitioners once more became aware that Solien was conducting settlement discussions outside their presence. Again, Sears and Terminal requested that they be allowed to participate in the settlement negotiations of their charges and, so that such participation would be meaningful, that they be informed of the factual basis of Solien's decision to issue a broadened complaint.[4] On July 15, 1970, these requests were denied by Solien and, on appeal, by the General Counsel of the Board a week thereafter. As such denial provided for no further administrative recourse, Petitioners commenced the present action to restrain Solien from engaging in further unilateral settlement negotiations.[5] The District Court's juris-

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[4] The Petitioners' request for information was expressly confined to the type of information generally available to a charging party prior to trial. Petitioners further stressed that such information could be disclosed, if necessary, with appropriate safeguards so that there would be no improper intrusion into the government's confidential files.

[5] As Petitioners were unsuccessful in obtaining temporary relief *pendente lite*, Solien continued to engage in unilateral negotiations which eventually culminated in a proposed formal settlement. Both Sears and Terminal have filed substantive objections to this proposal including, *inter alia*, the limited nature of the remedy provided for in the settlement agreement, the inclusion of exculpatory language therein and the failure of the agreement to set forth any stipulations of facts with respect to the unfair labor practices involved. Significantly, although the former general counsel of the Board had previously overruled these objections, the present general counsel has now determined that Petitioners' objections should be considered. The basis for reconsideration was primarily an extensive study which Petitioners conducted (See footnote 19, *infra*) that demonstrated the pervasive nature of the objections and the compelling need to examine the substantive components of settlement agreements generally. This determination is significant because it demonstrates that the *Solien* cases pending before this Court, are not isolated instances but, conversely, are representative of widespread practices.

diction was premised on 5 U.S.C. §§ 702-4 and 28 U.S.C. §§ 1337 and 1361.

On July 30, 1970, the District Court dismissed the complaint for lack of subject matter jurisdiction. This decision was affirmed by the court below on November 3, 1971. App. 6a. The Eighth Circuit concluded that, "however meritorious appellant's claim may appear, it is not for us to determine this critical issue at this time. . . . appellant may still obtain administrative relief from the Board." App. 5a. This holding, in Petitioners' opinion, confuses the Board's adjudicatory right to review the substantive content of formal settlement agreements with the General Counsel's prosecutorial right to determine the procedures to be followed in arriving at a settlement. In the latter case, the General Counsel's actions are reviewable only in a district court where, as here, there has been an abuse of discretion. The decision below, accordingly, raises significant questions in the administration of our national labor law which warrant the attention of this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Disregards the Separation of Powers Effected by Section 3(d) of the Act.

The present controversy is not only typical of secondary boycott situations, it also exemplifies settlement procedures that are uniformly applied in all unfair labor practice cases before the Board.[6] Moreover,

[6] More than 91% of all unfair labor practice charges are disposed of prior to hearing. Thus, only a small percentage of cases are ever litigated before either a trial examiner or the Board. 34th Annual Report of NLRB: Fiscal Year 1969, 1970 BNA Labor Relations Yearbook, 289, 291-3 (Bureau of National Affairs, Inc. 1971). The most significant impact on the right of charging parties, and the stage at which their deprivation is the most acute, is, accordingly, that involved in this case.

the issue involved is one that transcends in importance even this critical area. This case raises a fundamental question as to the continuing vitality of the prosecutorial-judicial dichotomy which underlies the administration of the Act.

Section 3(d) of the Act provides that the General Counsel of the Board "shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board . . ." (emphasis added). Congress intended that this provision would "effect a separation of the prosecuting and adjudicating functions within the Board." *Frito Company* v. *N.L.R.B.*, 330 F.2d 458, 462 (9th Cir. 1964). The General Counsel was to be *dominus litus;* his authority "as a prosecutor" was not to be "reviewable by the Board." *Id.* at 465.

The General Counsel's prosecutorial power must necessarily include, contrary to the decision below, the right "to consider and decide whether the public interest would be better served by settlement . . ." *Local 282 International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America* v. *N.L.R.B.*, 339 F.2d 795, 799 (2nd Cir. 1964).[7] For if,

[7] The Second Circuit in *Local 282* went on to observe that, of course, "if the settlement calls for an order, the Board, like a court presented with a consent decree, is not required to enter it." 339 F.2d at 779. This is surely the purport of Section 101.9(c)(2) of the Board's Rules (App. 20a), the controlling consideration in the view of the court below. The fact that the Board may not choose to approve a settlement on the basis of substantive objections, such as those described in Footnote 5, does not imply that the Board may control the procedures to be followed in arriving at the settlement. To use the analogy of the Second Circuit, while the Board can decide whether to enter a consent decree, it cannot control the procedural means the prosecutor may utilize in obtaining that decree.

as the Eighth Circuit presumes, the Board can dictate to the General Counsel the settlement procedures he must follow, then there has been a radical abridgement of the General Counsel's authority. By the same token, the Board would also be empowered to instruct the General Counsel as to whether to issue a complaint,[8] as to what his legal theory should be,[9] as to whether a complaint should be amended[10] or as to whether a particular settlement offer should be considered.[11] All of these matters, as well as others, would no longer be vested solely in the General Counsel. There would be, in short, a reversion to the situation which existed prior to the enactment of Section 8(d) in 1947: an amalgamation of the prosecutorial and judicial functions of the Board notwithstanding the clear Congressional intent to the contrary.[12]

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[8] Cf., e.g., *Lincourt* v. *N.L.R.B.*, 170 F.2d 306 (1st Cir. 1948).

[9] Cf., e.g., *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F.2d 575, 588 (3rd Cir. 1960), *cert. den.*, 364 U.S. 912 (1960), 364 U.S. 933 (1961).

[10] Cf., e.g., *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 289 F.2d 757 (D.C. Cir. 1960).

[11] Cf., e.g., *N.L.R.B.* v. *Ampex Corporation*, 442 F.2d 82 (7th Cir. 1971).

[12] The pre-1947 situation was one that "generated much criticism." As a result, the Hartley Bill in the House envisioned the creation of a new federal agency whose functions would be the issuance and prosecution of complaints before the Board. In the absence of such a provision in the Senate Taft Bill, a compromise occurred in conference. The conferees adopted the substance of the House proposals, incorporated them into the existing Board structure and thereby avoided the creation of a separate prosecutorial agency. There was "no doubt that Congress intended to make the General Counsel's decisions unreviewable by the Board." *International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 289 F.2d 757, 761 (D.C. Cir. 1960), and authorities cited therein.

This severe dislocation in the administration of the Act, it is submitted, warrants review by the Court.

2. The Instant Case Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court.

Review by this Court is also warranted to resolve an important, unanswered question of federal law. Where, as in this case, there is a final administrative decision of the General Counsel,[13] an equity action should lie in district court to consider whether such actions constitute an abuse of discretion. As one court observed, in holding that a district court has jusisdiction in such a case, "if Congress in its wisdom could see the need for a right of review from a decision entered by the National Labor Relations Board, as provided in Section 10(f) of the Act, it is difficult to understand how the Defendants can argue that a decision of General Counsel, as in the instant case, is not reviewable. This Court finds jurisdiction conferred by 28 U.S.C. 1337." *Local 112, International Union Allied Industrial Workers of America* v. *Rothman,* 209 F.Supp. 295, 297 (D.D.C. 1962).

This view, however, is by no means uniform. Mr. Justice Douglas recently commented that "since we have not yet ruled on the refusal of the General Counsel to act, that route *might be open* although at present the authority is to the contrary." *Amalgamated Asso-*

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[13] The final administrative nature of the General Counsel's July 22 denial of Petitioners' appeal (App. 13a) is clear from the authorities cited in the previous section of this petition. In addition, the General Counsel's determination "that the Regional Director . . . acted in accord with our practice" and his representations as to "Agency practice" (App. 13a) also significantly omit any mention of further administrative review as is the customary practice where rights of appeal exist.

ciation of Street, Electric Railway and Motor Coach Employees of America v. *Lockridge*, 403 U.S. 274, 29 L.Ed. 473, 493, n. 2 (1971) (dissenting opinion; emphasis added). The law is thus "in a state of flux." *Saez* v. *Goslee*, — F.Supp. — , 79 LRRM 2001, 2004 (D.P.R., Dec. 3, 1971).[14] The present case affords an appropriate vehicle for clarification as well as reaffirmance, in this significant area of the law, of the "hospitable interpretation" that must be given to the "generous review provisions" of the Administrative Procedure Act. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).[15]

The present case also provides the Court with an opportunity to correct the Eighth Circuit's erroneous interpretation of *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938). Contrary to the Circuit's view, that case does not foreclose district court review of "all questions of the regularity of Board proceedings, constitutional rights, or statutory authority" apart from the limited applicability of *Leedom* v. *Kyne*, 358 U.S. 184 (1958). App. 3a. *Myers* also permits an

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[14] See also, e.g., *Hourihan* v. *N.L.R.B.*, 201 F.2d 187, n. 4 (D.C. Cir. 1952) ("We need not canvass whether, and if so under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint"); *Southern California District Council of Laborers* v. *Ordman*, Civil No. 70-603-HP (C.D. Cal. Sept. 18, 1970) and the revised decision in *Bandlow* v. *Rothman*, 278 F.2d 866 (D.C. 1960), *cert. den.*, 364 U.S. 909 (1960).

[15] In *Abbott Laboratories*, this Court noted that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141. See also *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970) ("[J]udicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated") and H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 41 (1946) ("The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review").

equity action to contest actions of the General Counsel which are not subject to Board review by virtue of Section 3(d). Indeed, to the extent that the decision below fails to give weight to this important exception to *Myers*, the instant case is in direct conflict with *Jewel Companies, Inc.* v. *F.T.C.*, 432 F.2d 1155 (7th Cir. 1970). There, in a virtually identical situation arising under the Federal Trade Commission Act (15 U.S.C. § 21, *et seq.*), the controlling precedent was found not to be *Myers* but *Skinner & Eddy* v. *United States*, 249 U.S. 557 (1919). The same reasoning should similarly have been applicable to the instant case—as in *Jewel*, the issue here is "inherently legal"; there is no need for application of agency "expertise"; the "legal obligation of [the General Counsel] can be determined by the courts without delay"; and there is "no effective way of presenting the claim of invalidity at any later date." 432 F.2d at 1168, 1169.[16]

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[16] *Jewel* also recognized, as the court below failed to, that the doctrine of exhaustion of administrative remedies, assuming *arguendo* that it is applicable here, is not rigid dogma. The Seventh Circuit noted, in commenting on *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), that this Court "may be 'saying between the lines that a court has a discretionary power to require exhaustion or not . . .'," citing Davis, 3 Administrative Law Treatise § 20.02 at 23 (1965 Supp.). *Jewel* also quoted the following observations of Professor Jaffe (Jaffe, Judicial Control of Administrative Action, 435 (1965)):

> The existence of an important general question may warrant early review. . . . the situation is no longer what it was when [*Myers* v.] *Bethlehem* was decided. On the one hand there is no longer the same violent disposition to fight the agencies willy-nilly; on the other, we have learned that agency procedures can be as long-drawn out, as wasteful, as oppressive as the worst of judicial procedures.

Applying these principles, it is all the more apparent that *Myers* does not apply to the instant case. The conduct of the General Counsel complained of is now final and no purpose would be served by postponing judicial review. On the other hand, by delaying or

3. The Participatory Rights of Charging Parties Here Involved Should Be Recognized by This Court.

The General Counsel in this case has issued a complaint based upon Petitioners' charges. The adjudicatory phase of the unfair labor practice proceeding has thus begun. At this point, as this Court emphasized in *United Automobile Workers* v. *Scofield,* 382 U.S. 205, 219 (1965), "the charging party is accorded formal recognition; he may call witnesses and cross-examine others, may file a petition for reconsideration to a Board order . . . ." Lower courts have held to the same effect.[17] Even the Board's own rules provide that once the adjudicatory phase of an unfair labor proceeding has commenced the charging party is provided with a significant role and substantial protection of his interests.[18]

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foreclosing review, the court below encouraged the "unnecessary duplication of proceedings" and deification of "technical requirements" condemned by this Court in *United Automobile* v. *Scofield,* 382 U.S. 205, 212 (1965). If the General Counsel has erred, as Petioners contend, then surely he should be required to rectify that error at a time when evidence is still available and at a juncture when meaningful all-party negotiations are still possible.

[17] See *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, 549 (3rd Cir. 1953) (": . . the charging party, after complaint is issued . . . is entitled to a chance to be heard as the Administrative Procedure Act requires. He has a right to object if after hearing he does not like the result. But he certainly has nothing on which to base his objections unless there is a hearing and a record is made so that the court has something to go on."); *Leeds & Northrup* v. *N.L.R.B.*, 357 F.2d 527 (3rd Cir. 1966); and *Automobile Workers* v. *N.L.R.B.*, 231 F.2d (7th Cir. 1956).

[18] See Section 101.9(a) of the Rules and Regulations of the National Labor Relations Board (App. 19a):

> "Thus, after the complaint has been issued . . . the attorney in charge of the case and the regional director [shall] afford *all parties* every opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments . . ." (emphasis added).

Settlement negotiations constitute the General Counsel's substitute for a hearing. On the basis of such negotiations, the violations found, the remedy, the scope of the notice and the record before a circuit court on both enforcement and contempt are determined. If, as the Court recognized in *Scofield,* the charging party has the right to intervene in an enforcement proceeding, he must also have some right to develop the record in the negotiations which culminate in such judicial consideration, especially since the settlement agreement is the sole record before the Court in such a case.[19] And the exclusion of the charging party from settlement negotiations also deprives him of his only opportunity to press for a broader or more effective remedy, a lost opportunity which any ultimate judicial review under Section 10 can never cure.[20]

The sole reason advanced by Respondent in the court below for excluding a charging party from set-

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[19] The overriding importance of settlement negotiations to charging parties was vividly demonstrated by exhibits which Petitioners presented to the court below. These exhibits analyzed all settlement agreements involving Section 8(b)(4) of the Act which had come before the General Counsel and the Board in the past three fiscal years to which a charging party filed objections. They showed that *in no case* did the General Counsel or the Board change the agreement to conform to the changes proposed by the objecting charging party. Thus, the ultimate terms and remedy arrived at in the settlement negotiations, *without exception*, became the charging party's sole protection against a repetition of the union's secondary boycott.

[20] In a Section 10 proceeding, the Court would have before it only the agreement arrived at between the general counsel and the charged parties behind closed doors. So far as the record shows, *that agreement* and the Board's superimposed order may be entitled to enforcement. However, if given the opportunity to participate in the negotiations, the charging party might well have secured consent to a different agreement with more favorable terms and greater protection. Such a broader agreement may likewise have been supported by the record and entitled to enforcement.

permitted full participatory rights at a hearing, including, for example, the right to cross-examine witnesses, to present their own witnesses and to file exceptions and briefs. What could then be so sacrosanct about settlement negotiations that, unlike a hearing, the charging party is accorded none of these protections? Permitting charging parties to engage in a meaningful way in settlement negotiations is also consistent with the charged party's discovery rights,[22] the Freedom of Information Act (5 U.S.C. § 502,[24] and the principles of private party participation which have been recognized with respect to other agencies[25] and the overriding Congressional concern that neutral employers be afforded effective protection against the secondary boycott.[26] The rights here involved, accordingly, deserve express recognition by this Court.

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[22] See, e.g., *Madden* v. *Milk Wagon Drivers Union*, 229 F. Supp. 430 (N.D. Ill. 1964); and *Fusco* v. *Richard W. Kaase Baking Co.*, 206 F. Supp. 459 (N.D. Ohio 1962).

[24] See, e.g., *Getman* v. *N.L.R.B.*, — F.2d —; 78 LRRM 2101 (D.C. Cir. Aug. 31, 1971); and *American Mail Lines* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1966).

[25] See, e.g., *Moss* v. *C.A.B.*, 430 F.2d 891 (C.A. D.C., 1970).

[26] See, e.g., II Legislative History of the Labor-Management Reporting Act of 1959, pp. 989, 1376, 1425, 1446 and 1842 (1959); and Senate Report No. 105, 80th Cong., 1st Sess. (1947).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JERRY KRONENBERG
Borovsky, Ehrlich & Kronenberg
120 South LaSalle Street
Chicago, Illinois 60603

GERALD TOCKMAN
McMahon & Berger
7701 Forsyth Boulevard
St. Louis, Missouri 63105

Attorneys for Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Company

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

D. J. SULLIVAN
Lewis, Rice, Tucker, Allen & Chubb
611 Olive Street
St. Louis, Missouri 63101

Attorneys for Petitioner Sears, Roebuck and Co.

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit. Dated November 3, 1971.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20,462
No. 20,472

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE ASS'N., and
TERMINAL FREIGHT HANDLING CO.,
Appellants,

v.

JOSEPH H. SOLEIN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

November 3, 1971.

Before MEHAFFY, Ross and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The facts of this case are fully revealed in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440

F.2d 124 (8 Cir. 1971)[1] (hereinafter referred to as "Solien I") and *Terminal Freight Handling Co.* v. *Solien*, 444 F.2d 699 (8 Cir. 1971)[2] (hereinafter referred to as "Soliten II"). Only those directly pertinent will be restated.

Appellants filed an unfair labor practice charge with the NLRB alleging that Teamsters Local 610 was engaging in a secondary boycott in violation of § 8(b)(4)(B) (29 U.S.C. § 158(b) (4)(B)). After an initial refusal to do so (see *Solien* II), the Regional Director petitioned for a temporary injunction pursuant to § 10(l) (29 U.S.C. § 160 (1)). The Regional Director, however, conducted unilateral settlement negotiations with the Union to dispose of the charges set forth in the complaint. When the Regional Director refused appellants permission to participate in the negotiations, they instituted the present action in district court where it was dismissed for lack of subject matter jurisdiction.

Appellants assail Judge Harper's dismissal of their suit to enjoin the Regional Director from approving or engaging further in settlement discussions without the informed participation of the charging parties (the appellants). Over appellants objections, the Regional Director and the Union executed a formal settlement agreement which provided for the entry of a Board order and enforcement decree from the Court of Appeals. The settlement agreement having been approved by the General Counsel, it has been submitted to the Board.

The gist of appellants' claim is thus: Rather than pursue the prescribed course of temporary injunction, hearing and

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[1] In *Solien I*, this Court ruled that a charging party does not possess the status of a full party litigant nor can it intervene in a district court injunction proceeding pursuant to § 10(l) of the National Labor Relations Act.

[2] In *Solien II*, this Court ruled that upon a *reasonable cause* determination by the Regional Director pursuant to § 10, and if he is unable to secure a cessation of the unlawful conduct upon summary demand or by negotiation, it is mandatory that he then petition for temporary injunction and issue a complaint.

Board order (in which event the charging parties would have limited rights to call, examine and cross-examine witnesses and present evidence for the record), or conclude an informal settlement agreement (in which event the concurrence of the charging parties must be obtained, see *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3 Cir. 1966)), the Regional Director elected to negotiate a formal settlement agreement with the Union while refusing to allow appellants the right to participate in such negotiations. Although appellants may formally object to the proposed settlement by appeal to the General Counsel and the Board, appellants assert that their exclusion from the negotiations effectively prevents them as charging parties from sufficiently learning the facts in order to formulate meaningful and valid objections to the settlement agreement. They claim the broadened rights granted to charging parties under the policy expressed in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), have here been arbitrarily denied them by the Regional Director and General Counsel.

Appellants also assert that the district court has jurisdiction over this subject matter. They contend that § 3(d) (29 U.S.C. § 153(d)) which grants to the General Counsel *final authority* concerning § 10 investigations, charges and prosecutions, precludes the Board from reviewing the issue at hand, thereby foreclosing any appellate review of their claim. In short, appellants contend the district court is the only avenue open to them for judicial review of the actions of the Regional Director and General Counsel since there are no further administrative remedies available. We disagree.

It has long been settled that jurisdiction to prevent persons from engaging in unfair labor practices is exclusively vested in the Board and courts of appeals. Upon review by the appellate court, all questions of the regularity of Board proceedings, constitutional rights, or statutory authority are open for examination. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *United Aircraft*

Corp. v. *McCulloch*, 365 F.2d 960 (D.C. Cir. 1966). There is one exception to the rule. A district court has jurisdiction when the Board or its agents engage in acts which are either contrary to specific prohibitions of the Act or are in excess of their delegated powers. *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Solien II*, *supra*, at 703-704. Appellants, however, must also contend with the rule of judicial administration that no judicial relief is available unless the prescribed administrative remedies have been exhausted. *Myers* v. *Bethlehem*, *supra*, at 50-51, and *Meekins Inc.* v. *Boire*, 320 F.2d 445 (5 Cir. 1963).

Appellants claim that the conduct of the Regional Director was contrary to the Rules and Regulations promulgated by the Board.

Relevant excerpts of the Board's Rules are as follows:

> 29 C.F.R. § 102.8 Party.
>
> The term "party" as used herein shall mean . . . *any person filing a charge or petition under the act*, ...
>
> § 101.9 Settlement after issuance of complaint.
>
> (a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director *afford all parties every opportunity for the submission of facts, arguments, offers of settlement, or proposals of adjustment*, except where time, the nature of the proceedings, and the public interest do not permit.
>
> (c)(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the

charging party and *submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent.* * * * (emphasis added).

From reading the above rules, we cannot say that the practice of the Regional Director in excluding charging parties from formal settlement negotiations is clearly contrary to the Board's directives in §.101.9(a). Indeed, however meritorious appellants' claim may appear, it is not for us to determine this critical issue at this time. Section 101.9(c) (2) clearly states that this issue is reviewable not only by the General Counsel but also by the Board and, therefore, an appellate court. See also *Leeds & Northrup Co.* v. *NLRB, supra,* at 534. We conclude appellant may still obtain administrative relief from the Board. Furthermore, the Board itself is the appropriate tribunal for primary interpretation of its own rules. See *NLRB* v. *Monsanto Chemical Co.,* 205 F.2d 763 (8 Cir. 1953); *NLRB* v. *Grace Co.,* 184 F.2d 126 (8 Cir. 1950) and *NLRB* v. *J. S. Popper, Inc.,* 113 F.2d 602 (3 Cir. 1940). *Cf. Textile Workers Union of America* v. *NLRB,* 294 F.2d 738 (D.C. Cir. 1961).

In conclusion, we cannot say that the conduct complained of is clearly in excess of the Regional Director's power. Since a determination of this issue is dependent upon a construction of the rules adopted by the Board, the Board itself is the proper forum to first pass on this matter. Furthermore, it is clear that appellants have not exhausted their available administrative remedies. A mere assertion of illegality of a practice of the Regional Director when full Board and appellate review is available is insufficient to grant the district court subject matter jurisdiction in the face of the well established doctrine of exhaustion of administrative remedies.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment of the United States Court of Appeals for the Eighth Circuit Dated Nov. 3, 1971

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20462
No. 20472

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Appellants,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

November 3, 1971

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri and were argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby affirmed.

Costs Taxed in Favor of the Appellee:

Cost of printing Appellee's Brief	$200.15
Total Cost of Appellee for Recovery from Appellants in U.S. District Court	$200.15

Dated: November 3, 1971

Order of the United States District Court For the Eastern District of Missouri, Eastern Division, Dated July 30, 1970.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SEARS, ROEBUCK AND CO., and
TERMINAL FREIGHT COOPERATIVE
ASSOCIATION and
TERMINAL FREIGHT HANDLING CO.,
Plaintiffs,

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board,
Defendant.

No. 70 C 356(1).

ORDER.

Motion of defendant to dismiss the complaint for lack of jurisdiction, sustained, and said cause is dismissed for lack of jurisdiction.

/s/ Roy W. Harper
U. S. District Judge

(Dated: July 30, 1970).

On July 2, 1970, and pursuant to the original and amended charges filed by the charging party herein in Case No. 14-CC-603, the Regional Director issued a consolidated complaint against the Union, alleging in general boilerplate terms, various acts and conduct in violation of Section 8 (b) (4) (ii) (B) of the Act. The case is set for hearing before a trial examiner on July 27, 1970.

Following the issuance of said complaint, the charging party learned that the Regional Director had considered and was conducting settlement discussions with representatives of the Union and that various proposals and counter proposals had been and were being exchanged. The charging party was not and has not been apprised of the nature or content of said settlement proposals, nor was it afforded any advance notice of said discussions or an opportunity to be present and to participate in said settlement negotiations. Furthermore, the Regional Director did not and has not given the charging party an opportunity to suggest settlement terms which would or might be acceptable to the charging party or to otherwise state its position regarding any such settlement.

As a result, the charging party's attorney, D. J. Sullivan, on July 14, 1970, wrote to the Regional Director inquiring as to whether any settlement negotiations had occurred and requesting, in the event said discussions were occurring, that said discussions cease until such time as the charging party is afforded advance notice thereof and the opportunity to participate in all such discussions.

Receiving no response to the aforesaid letter, attorney Sullivan did, on July 15, 1970, meet with the Regional Director, at which time he was advised that extensive settlement negotiations had occurred and were occurring with representatives of the Union, that as of that date no acceptable settlement had been obtained.

Upon receipt of this information, Attorney Sullivan thereupon again requested, as the representative of a party to the proceeding, that the Regional Director:

(a) advise the charging party of the dates and times of any further settlement negotiations and afford the charging party an opportunity to be present and to participate in any and all future negotiations; and

(b) furnish the charging party with copies of all affidavits in his possession, upon which the Regional Director relied in issuing the foregoing complaint, so that the charging party could properly evaluate and determine the appropriateness of any proposed settlement and, in the event settlement was not obtained, to enable the charging party to prepare its own case for trial.

The Regional Director refused to grant any of the foregoing requests, claiming that the charging party had no right to the same. Furthermore, although confirming that it was customary practice within the region to supply to the charging party in advance of trial a copy of the region's trial brief to the charging parties, the Regional Director indicated that the charging party would not be supplied with such a document in the instant case.

6. The charging parties' request to be present at any and all settlement discussions with the Respondent Union is predicated on its fundamental right as a statutory party to fully participate in the instant proceeding, in which complaint has been issued and in which a hearing date has been scheduled. As a party, the charging party herein is entitled to be heard with respect to any and all "settlement proposals and to participate in any discussions or negotiations pertaining thereto. *Leeds and Northrup v. NLRB*, 382 U.S. 205.

Consistent with that right, the charging party is in need of and entitled to certain information, including the

aforesaid requested affidavits, showing the facts upon which the Regional Director relied in issuing his complaint herein.

Said information is essential to enable the charging party to determine whether any settlement proffered by the respondent Union and/or the Regional Director will satisfactorily and effectively remedy the underlying violations and serve to prevent a recurrence of the unlawful acts and conduct to which the Regional Director determined the charging party had been and is being subjected. Furthermore, in the event a settlement is not obtained, said information is needed to enable the charging party to properly prepare its own case for trial.

The charging party submits that all of the foregoing requests must be granted if it is to be afforded its statutorially recognized status as a full party in an NLRB complaint proceeding and in order to fully effectuate its rights therein consistent with established law. See, *United Automobile Workers* v. *Scofield*, 382 U. S. 250 (1965); *Leeds and Northrup* v. *NLRB*, *supra*.

For the reasons set forth above, the charging party moves that the General Counsel reverse and overrule the Regional Director's arbitrary and unwarranted actions, as herein specified, and that he forthwith order and direct the Regional Director to:

(1) immediately cease and desist from engaging in any further *ex parte* communications with the respondent Union pertaining to settlement of the instant case or further engaging in any *ex parte* negotiating sessions; and

(2) promptly give the charging party reasonable advance notice of any future settlement conferences and give the charging party an opportunity to be present and to participate in any future settlement negotiations; and

(3) make available to the charging party any and all settlement proposals, whether written or otherwise, heretofore considered by the Regional Director; and

(4) make available to the charging party for inspection and copying all affidavits or other evidence in the custody and control of the Regional Director upon which he relied in issuing the complaint herein, excluding any internal agency memorandum or communications which would be privileged from disclosure under Public Law 90-23, 5 U. S. C., § 552(b).

The charging party further requests a ruling on the matter set forth herein at or before 2:00 p.m. (ESDT) on July 17, 1970. The charging party submits that it has already suffered and is continuing to suffer substantial and irreparable harm and in derogation as its right as a charging party by the continuance of the above described *ex parte* settlement discussions. This irreparable harm creates the necessity for a prompt reversal of the Regional Director's determinations within the time limitation prescribed herein.

Respectfully submitted,

S. RICHARD PINCUS
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Charging Party,
Sears, Roebuck and Co.

July 17, 1970.

Decision of the General Counsel of the National Labor Relations Board On Appeal From Regional Director's Denial of Charging Parties' Rights. Dated July 22, 1970.

National Labor Relations Board
Office of the General Counsel
Washington, D. C. 20570

July 22, 1970

S. Richard Pincus, Esquire
Lederer, Fox & Grove
111 West Washington Street
Chicago, Illinois 60602

Re: Sears, Roebuck & Company
Case No. 14-CC-603

Dear Mr. Pincus:

This is in reply to the document delivered to my office on Friday, July 17, 1970, which was phrased and headed as being in the nature of a formal "Appeal" from certain actions taken by the Regional Director in the above matter and your request for information.

I have inquired into the matter and find that the Regional Director in each instance acted in accord with our practice and properly rejected your request. In sum, it is our position that:

(1) There is no requirement under Agency practice that all concerned parties be present whenever settlement proceedings are being explored prior to the opening of formal hearings between Agency staff members and any of the parties. By the same token, notice of conferences for purposes of settlement on the subject matter of such conferences need not be transmitted to all concerned parties. On the other hand, any settlement proposal which the Office of the General Counsel, acting through its Regional Director or other authorized Agency representative,

might consider as acceptable would be submitted to all such concerned parties and their views would be taken into account in connection with the determination as to whether or not such settlement should be approved.

More specifically, and in direct response to your request, *Leeds & Northrup*, whatever else it requires, does not require that we notify a charging party of when the preliminary settlement negotiations are to be held or furnish it with various preliminary working settlement proposals which might be submitted in an attempt to arrive at a final settlement proposal, nor does it hold that a charging party has the right to be present and participate in the preliminary settlement discussions between the Director and a respondent.

(2) A charging party is not entitled to inspect or copy the affidavits or other evidence upon which a Director relies in issuing a complaint. All such matter is privileged and, moreover, the Director's mental processes and the particular bases upon which he predicated his conclusion to issue a complaint are irrelevant to any proceeding on the complaint and not an appropriate subject for inquiry either during the proceedings before the Board or prior thereto.

Finally, you also complain that the Regional Director refused to furnish you with an advance copy of the Region's trial brief. It is my information that no such brief has been prepared thus far. In any event, however, the Director is not required to furnish you with copies of any brief except at the time such brief is submitted to the trial examiner or to the Board.

Very truly yours,

/s/ ARNOLD ORDMAN
ARNOLD ORDMAN
General Counsel

STATUTES INVOLVED

NATIONAL LABOR RELATIONS ACT (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) .

Sec. 3(d), 29 U.S.C. § 153(d):

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

* * *

Sec. 10(e), 29 U.S. C. § 160(e):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served

upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that, the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

Sec. 10(f), 29 P.F.C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief

sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

ADMINISTRATIVE PROCEDURE ACT, (80 Stat. 381, 5 U.S.C. § 701, *et seq.*)

* * *

Sec. 702, 5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Sec. 703, 5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by a statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judg-

ments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Sec. 704, 5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

62 STAT. 931, 28 U.S.C. § 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

76 STAT. 744, 28 U.S.C. § 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED (29 C.F.R. 102.1 *et seq.*):

Sec. 102.8:

Party.—The term "party" as used herein shall mean the regional director in whose region the pro-

ceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 101.9:

Settlement after issuance of complaint.—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (section 102.18), may conclude that an informal settlement agreement of the type described in section 101.7 is appropriate. Such an agreement is not subject to approval by the Board and does not pro-

withdrawal of the complaint must be

for his approval. If the

one, final approval

Board. If any party will not join

agreed to by the other parties, the

will give such party an opportunity to

record or in writing its reasons for op-

trial examiner decides to accept or reject

settlement, any party aggrieved by such

ask for leave to appeal to the Board as

section 102.26.

event the respondent fails to comply

terms of a settlement stipulation, upon which a

order and court decree are based, the Board may

the court to adjudge the respondent in con-

If the respondent refuses to comply with the

of a stipulation settlement providing solely for

entry of a Board order, the Board may petition the

for enforcement of its order, pursuant to section

of the National Labor Relations Act.

In the event the respondent fails to comply with

terms of an informal settlement agreement, the

Regional Director may set the agreement aside and in-

stitute further proceedings.